

§ 23.47

shall be used only in cases where at least three MBEs with capabilities consistent with contract requirements exist so as to permit competition.

APPENDIX A TO § 23.45—GUIDANCE CONCERNING GOOD FAITH EFFORTS

To determine whether a competitor that has failed to meet MBE contract goals may receive the contract, the recipient must decide whether the efforts the competitor made to obtain MBE participation were “good faith efforts” to meet the goals. Efforts that are merely *pro forma* are not good faith efforts to meet the goals. Efforts to obtain MBE participation are not good faith efforts to meet the goals, even if they are sincerely motivated, if, given all relevant circumstances, they could not reasonably be expected to produce a level of MBE participation sufficient to meet the goals. In order to award a contract to a competitor that has failed to meet MBE contract goals, the recipient must determine that the competitor’s efforts were those that, given all relevant circumstances, a competitor actively and aggressively seeking to meet the goals would make.

To assist recipients in making the required judgment, the Department has prepared a list of the kinds of efforts that contractors may make in obtaining MBE participation. It is not intended to be a mandatory checklist; the Department does not require recipients to insist that a contractor do any one, or any particular combination, of the things on the list. Nor is the list intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases. In determining whether a contractor has made good faith efforts, it will usually be important for a recipient to look not only at the different kinds of efforts that the contractor has made, but also the quantity and intensity of these efforts.

The Department offers the following list of kinds of efforts that recipients may consider:

(1) Whether the contractor attended any pre-solicitation or pre-bid meetings that were scheduled by the recipient to inform MBEs of contracting and subcontracting opportunities;

(2) Whether the contractor advertised in general circulation, trade association, and minority-focus media concerning the subcontracting opportunities;

(3) Whether the contractor provided written notice to a reasonable number of specific MBEs that their interest in the contract was being solicited, in sufficient time to allow the MBEs to participate effectively;

(4) Whether the contractor followed up initial solicitations of interest by contacting MBEs to determine with certainty whether the MBEs were interested;

49 CFR Subtitle A (10–1–98 Edition)

(5) Whether the contractor selected portions of the work to be performed by MBEs in order to increase the likelihood of meeting the MBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate MBE participation);

(6) Whether the contractor provided interested MBEs with adequate information about the plans, specifications and requirements of the contract;

(7) Whether the contractor negotiated in good faith with interested MBEs, not rejecting MBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;

(8) Whether the contractor made efforts to assist interested MBEs in obtaining bonding, lines of credit, or insurance required by the recipient or contractor; and

(9) Whether the contractor effectively used the services of available minority community organizations; minority contractors’ groups; local, state and Federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of MBEs.

(Title VI of the Civil Rights Act of 1964; sec. 30 of the Airport and Airway Development Act of 1970, as amended; sec. 905 of the Railroad Revitalization and Regulatory Reform Act of 1976; sec. 19 of the Urban Mass Transportation Act of 1964, as amended; 23 U.S.C. 324; E.O. 11625; E.O. 12138)

[45 FR 21184, Mar. 31, 1980, as amended at 46 FR 23461, Apr. 27, 1981; 52 FR 39230, Oct. 21, 1987]

§ 23.47 Counting MBE participation toward meeting MBE goals.

MBE participation shall be counted toward meeting MBE goals set in accordance with this subpart as follows:

(a) Once a firm is determined to be an eligible MBE in accordance with this subpart, the total dollar value of the contract awarded to the MBE is counted toward the applicable MBE goals.

(b) The total dollar value of a contract to an MBE owned and controlled by both minority males and non-minority females is counted toward the goals for minorities and women, respectively, in proportion to the percentage of ownership and control of each group in the business. The total dollar value of a contract with an MBE owned and controlled by minority women is counted toward either the minority goal or the goal for women, but not to both. The contractor or recipient employing the firm may choose the goal to which the contract value is applied.

(c) A recipient or contractor may count toward its MBE goals a portion of the total dollar value of a contract with a joint venture eligible under the standards of this subpart equal to the percentage of the ownership and controls of the MBE partner in the joint venture.

(d)(1) A recipient or contractor may count toward its MBE goals only expenditures to MBEs that perform a commercially useful function in the work of a contract. An MBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether an MBE is performing a commercially useful function, the recipient or contractor shall evaluate the amount of work subcontracted, industry practices, and other relevant factors.

(2) Consistent with normal industry practices, an MBE may enter into subcontracts. If an MBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the MBE shall be presumed not to be performing a commercially useful function. The MBE may present evidence to rebut this presumption to the recipient. The recipient's decision on the rebuttal of this presumption is subject to review by the Department.

(e)(1) A recipient or contractor may count toward its MBE, DBE or WBE goals 60 percent of its expenditures for materials and supplies required under a contract and obtained from an MBE, DBE or WBE regular dealer, and 100 percent of such expenditures to an MBE, WBE, or DBE manufacturer.

(2) For purposes of this section, a manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the recipient or contractor.

(3) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are

bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business, and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning of this section.

(f) A recipient or contractor may count toward its MBE, DBE, or WBE goals the following expenditures to MBE, DBE, or WBE firms that are not manufacturers or regular dealers:

(1) The fees or commissions charged for providing a *bona fide* service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(2) The fees charged for delivery of materials and supplies required on a job site (but not the cost of the materials and supplies themselves) when the hauler, trucker, or delivery service is not also the manufacturer of or a regular dealer in the materials and supplies, provided that the fee is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) The fees or commissions charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

[45 FR 21184, Mar. 31, 1980, as amended at 52 FR 39230, Oct. 21, 1987]

§ 23.49 Maintenance of records and reports.

(a) In order to monitor the progress of its MBE program the applicant/recipient shall develop a recordkeeping